Pontiac Ceiling & Partition Co., LLC *and* Local 9, International Union of Bricklayers and Allied Craftworkers, AFL–CIO, Petitioner and Local 16, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Intervenor. Case 7–RC–21933

December 20, 2001

DECISION ON REVIEW

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On March 23, 2001, the Acting Regional Director for Region 7 issued a Decision and Order (relevant portions of which are attached as an appendix). Thereafter, in accordance with Section 102.67 of the National Labor Relation Board's Rules and Regulations, the Petitioner filed a timely request for review of the Acting Regional Director's decision and the Intervenor filed an opposition. By Order dated July 18, 2001, the Board granted the Petitioner's request for review. The Petitioner filed a brief on review.

Having carefully considered the entire record, including the Petitioner's brief on review, with respect to the issue of whether the Employer and the Intervenor entered into a 9(a) bargaining relationship, the Board has decided to affirm the Acting Regional Director's decision.[1] Having found a 9(a) relationship, the Board further affirms the Acting Regional Director's determination that the present petition is barred and thus should be dismissed.[2]

Dated, Washington, D.C. December 20, 2001

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, concurring.

I agree that the collective-bargaining agreement here contains language that establishes a 9(a) relationship. In my view, however, that agreement and language—standing alone—bind only the parties thereto. Thus, because the Petitioner Bricklayers Union is not a party to that agreement, it would ordinarily be privileged during the 6-month period following the Employer's recognition of the Plasterers' Union to assert that such recognition is not majority based. It did not do so. Accordingly, for the reasons set forth in my concurring opinions in *Verkler, Inc.*, 337 NLRB No. 18 (2001), and *Reichenbach Ceiling & Partition Co.*, 337 NLRB No. 17 (2001), I would dismiss the Bricklayers' petition.

In this case, however, there is an additional basis on which I would dismiss the petition. Here, there is extrinsic evidence that, at the time of recognition, the Plasterers' Union was the 9(a) representative of the Employer's employees. This extrinsic evidence consists of majority authorization cards that the Plasterers' Union presented to the Employer at that time. Thus, quite apart from the language showing majority status, there is extrinsic evidence of majority status.

Accordingly, for both of the foregoing reasons, I concur the petition in this case should be dismissed.

Dated, Washington, D.C. December 20, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[2] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved herein claim to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer, Petitioner, and Intervenor stipulated that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time plasterers employed by the Employer working at and out of its facility located at 715 Auburn Road, Pontiac, Michigan; but excluding all other employees, guards and supervisors as defined in the Act.

[1] *Central Illinois Construction*, 335 NLRB No. 59 (2001).

[2] *VFL Technology Corp.*, 329 NLRB 458 (1999) (reiterating the Board's policy that "a 9(a) contract will bar any petition filed outside the window period of that contract").

[2] The parties filed briefs which were carefully considered.

Petitioner filed the instant petition on December 19, 2000, requesting certification as representative in a bargaining unit comprised of the Employer's approximately 46 plasterer employees. The Employer and Intervenor assert that they are parties to a collective-bargaining agreement effective from June 1, 2000, through May 31, 2003, which bars the instant petition. The Petitioner contends that the contract is an 8(f) agreement, and therefore not a bar, based on the Intervenor's failure to demonstrate its majority status. There is no collective-bargaining history between the Employer and the Petitioner.

The Employer (or PCPC) is a plaster contractor that does not directly employ plasterers. Rather, PCPC has a sister enterprise known as W&G, L.L.C. (W&G), a payroll processing company which supplies plasterers to PCPC, although no contractual relationship exists between PCPC and W&G. PCPC's president is Phil Ruffin. The president of W&G is Ron Slaght, who also serves as the vice president of PCPC. Slaght is paid by PCPC where he maintains an office, but receives no salary from W&G.

The plasterers receive their paychecks from W&G, although the record implicates that they believe they are employees of PCPC. PCPC and W&G both are owned by a parent company, National Construction Enterprises (NCE), itself owned by Robert Walrich. In addition, NCE is parent to approximately 14 to 15 other companies, including Ann Arbor Ceiling & Partition Co., L.L.C. (AACPC) and Huron Valley Glass Co. (Huron Valley). AACPC performs very little plaster work itself, instead subcontracting such work to PCPC. The record indicates that W&G performs payroll services for both AACPC and Huron Valley, in addition to PCPC. Payroll checks for plasterers of PCPC issue in the name of W&G, but payroll and check-writing duties are performed by a PCPC employee.

All plaster work is bid on by PCPC, which then pays W&G for the cost of labor. Wayne Daniels is the PCPC superintendent in charge of all plaster and fireproofing work, although he is employed by W&G. Daniels supervises and obtains workers for PCPC through the Intervenor. Daniels also has foremen (on the payroll of W&G) working for him who directly supervise the plasterers. Daniels reports to Mark Gottler, the general superintendent, who is employed by PCPC. Gottler in turn reports to Ruffin, PCPC's president. Work assignments are passed from the general contractors to Gottler, to Daniels, and then to the foremen.[3]

The Architectural Contractors Trade Association (ACT), formerly known as the Detroit Association of Wall & Ceiling Contractors, is a multiemployer association formed for purposes of collective bargaining. ACT is made up of 49 or 50 contractors employing over 2000 employees in different skilled trades. Approximately six or seven of the contractor members are plasterer contractors employing between 100–125 employees. The record indicates that ACT and Intervenor were parties to an 8(f) agreement effective by its terms from June 1, 1997 through May 31, 2000. Prior to this agreement, on August 18, 1995, W&G, through its then President Robert Walrich, the current owner of both PCPC and W&G, executed a power of attorney to ACT delegating authority to negotiate and sign collective bargaining agreements with the Intervenor, and other labor organizations. The power of attorney recites that it is for an indefinite period subject to written notice of cancellation. PCPC has never signed its own power of attorney to ACT, purportedly because it has never directly employed any employees.

In May 2000, ACT, represented by Ruffin (who sits on its board of directors), George Strip, president of AACPC and also president of ACT, along with two other employers, met three times with Intervenor Business Agents Terry VanAllen and Chuck Novak, and also with plasterer Jack McKool.[4] Throughout negotiations, the Intervenor proposed adding Section 9(a) recognition language to the collective-bargaining agreement as follows:

> Each Employer, in response to the Union's claim that it represents a majority of each Employer's employees acknowledges and agrees that there is no good faith doubt that the Union has been authorized to, and in fact does, represent such majority of employees.
>
> The employer agrees to recognize, in such cases, the Plasterers' & Cement Masons Local 67 [Intervenor] as the majority representative of its Employees pursuant to Section 9(a) of the Labor-Management Relations Act. They are now or hereafter the sole and exclusive collective bargaining representative for the employees in the bargaining unit with respect to wages, hours of work and all other terms and conditions of employment.

VanAllen testified that the Intervenor sought the 9(a) language to "secure the contract so no other labor organization could interfere with [u]s during the duration of the contract and they would be bound to negotiate with us at the end of the contract." VanAllen told the ACT representatives that he had signature cards from ACT employees and that he was prepared to take the contractors to an election. VanAllen further testified that he placed the cards on the table but he never informed the ACT representatives present of the number of cards that he had in his possession. However, VanAllen did state to the ACT representatives that the Intervenor represented a majority of ACT employees and that he had the cards to prove it. No ACT representative touched the cards or questioned the Intervenor's claim of majority status during the bargaining sessions. By the last meeting, the parties had agreed to the inclusion of the Intervenor's proposed 9(a) language. Ruffin testified that at the time the language was agreed on he believed that the Intervenor indeed represented a majority of the Employer's employees because the Employer had maintained a bargaining relationship with the Intervenor for many years and the vast majority of its employees had been referred from the Intervenor's hiring hall or had participated in the Intervenor's apprenticeship school.

About May 29, 2000, at the third negotiation session, the parties reached agreement on the terms of the new collective bargaining agreement to become effective June 1, 2000. The Intervenor's membership ratified the terms of the contract shortly after May 30, 2000, but the parties did not execute or otherwise sign off on the terms of the contract at that time. Instead, over the course of the first week of June, the parties negotiated changes to the agreed-upon contract which eventually resulted in the parties during that week signing a document titled "Contract Changes to the 2000–2003 Collective Bargain-

[3] Despite the Petitioner's refusal to stipulate to the supervisory status of Daniels, Gottler, and Ruffin, I find that they are all supervisors within the meaning of Sec. 2(11) of the Act, given that Daniels has the authority to effectively recommend hire, layoff, and termination of employees, and that Gottler and Ruffin have final authority on such matters.

[4] McKool is an employee of another contractor, Russell Plastering.

ing Agreement." This document modified 13 provisions of agreed-upon contact, but otherwise left the remaining portions in effect. However, the signatures of the representatives of the ACT and the Intervenor are undated on the contract changes. VanAllen testified that in the first week of June 2000, he saw Charles Novak, the Intervenor's business manager, sign the document with Strip's signature already present.

The final booklet version of the current 2000–2003 contract, that incorporates the amendments in the letter of understanding, has never itself been executed and was not printed until about August 2000. In late June 2000, VanAllen delivered a stack of copies of authorization cards to Ruffin, assertedly from employees of the Employer. Upon placing the cards on Ruffin's desk, VanAllen stated that this was a "formality" to make the contract legitimate. However, Ruffin did not examine the cards or thereafter maintain them in his possession.

During November 2000, before the filing of the instant petition on December 19, 2000, ACT and the Intervenor executed an amendment to the contract extending the geographic coverage of the contract to the counties of Livingston (excluding certain townships and the city of Howell), Washtenaw, and Sanilac. The amendment specifically provided that no other terms of the contract were being modified by the parties and that the remainder of the contract not in conflict with the amendment remained in full force and effect. This amendment was signed by Strip on behalf of ACT on November 21, and by Novak on behalf of the Intervenor on November 27, 2000. The Intervenor had proposed to expand the territorial coverage of its contract based on its belief that the Intervenor could better represent its members who occasionally worked outside its existing contractual jurisdiction and that members who now worked outside the Intervenor's jurisdiction would have fringe benefits credited to its fringe benefit funds. The expansion of geographic coverage did not have the effect of increasing the number of employees included in the unit since at the time PCPC was not performing work in the newly added counties. However, the new counties had traditionally been within the geographic jurisdiction of the Petitioner. In the past, when PCPC had performed work within the jurisdiction of another union, PCPC would send a core group of its own employees to the job, and contributions were paid to the other union's fringe benefit funds. If additional employees were required for the job, they were referred by the union within whose jurisdiction the jobsite was located.

In January 2001, after the filing of the petition in this matter, VanAllen again visited Ruffin at a jobsite and presented him with copies of 20–30 plasterer authorization cards. This time, Ruffin testified that he looked at the documents and recognized the employees who had signed them, although he did not count the cards or retain them. According to Ruffin, VanAllen stated that the cards were proof that Local 67 enjoyed majority status and supposedly were the same cards that had been signed prior to May 29, 2000. At some point in January 2001, Ruffin reviewed payroll records of the approximately 46 employees who had worked for PCPC during the prior year, and determined that 70 percent were members of Intervenor, 26 percent were members of Plasterers' Local 16, and 4 percent were members of the Petitioner. Thereafter, on February 15, 2001, Ruffin, on behalf of PCPC, and VanAllen, on behalf of the Intervenor, signed a "Recognition Agreement" recognizing the Intervenor as the 9(a) representative of the plasterers. This was the first agreement directly between PCPC and the Intervenor. The provisions of the recognition agreement reads as follows:

> After having reviewed authorization cards provided by Operative Plasterers & Cement Masons International Association, Local 67, the Employer acknowledges and agrees that a majority of its employees have authorized Local 67 to represent them in collective bargaining. The Employer hereby recognizes Local 67 as the exclusive collective bargaining representative under Section 9(a) of the National Labor Relations Act of all full-time and regular part-time plasterers employed by the Employer on all present and future job sites within the jurisdiction of the Union.

Initially, it is necessary to address the issue of whether PCPC and W&G constitute a single employer, as contended by the Employer and Intervenor. Indeed, PCPC and W&G both were represented by PCPC President Ruffin at the hearing. Although Petitioner refused to stipulate to the single employer status of PCPC and W&G, and further argues that W&G is at most a payroll company for several companies falling under the NCE umbrella, the instant petition would require outright dismissal if the two entities are not found to be a single employer as Petitioner seeks only PCPC's plasterers. However, the uncontroverted record establishes that PCPC does not have any plasterers on its payroll, and that it is W&G which actually employs them.[5]

It is well settled that two separate entities will constitute a single employer when they operate as an integrated enterprise in such a way that "for all purposes, there is in fact only a single employer." *NLRB v. Browning-Ferris Industries*, 259 NLRB 148 (1981), enfd. 691 F.2d 1117, 1122 (3d. Cir. 1982). The principal factors which the Board considers in determining whether the integration is sufficient for single-employer status are: (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. *Radio Union v. Broadcast Services of Mobile*, 380 U.S. 255 (1965). The most critical of these factors are centralized control over labor relations and common ownership.

Robert Walrich, who owns the parent company, NCE, also owns and has financial control over both PCPC and W&G. Ruffin and Gottler, both employed by PCPC, hire, fire, and are ultimately responsible for directing the work of the plasterers on the payroll of W&G. These two individuals fully control labor relations matters and manage the plasterers. Their directives are passed through Daniels and the foremen, all employees of W&G. Additionally, PCPC and W&G are operationally interdependent. For example, payroll checks, although bearing W&G's name, are issued by PCPC. The checks are prepared at PCPC offices by a PCPC employee. Accordingly, I find that PCPC and W&G constitute a single employer under the NLRA. As a single employer, W&G signed a power of attorney to ACT in 1995, which I find bound not only W&G but also PCPC to any collective bargaining agreement negotiated by ACT.

The Employer and Intervenor contend that the collective-bargaining agreement between ACT and Intervenor dated 2000–2003 is a 9(a) pact that bars the instant petition. In the construction industry, parties may create a relationship pursuant

[5] The Petitioner's reluctance to agree that a single employer relationship exists no doubt results from the consequences that would entail as to the power of attorney executed by W&G assertedly on behalf of PCPC, as discussed below.

to either Section 9(a) or Section 8(f) of the Act. In the absence of evidence to the contrary, the Board presumes that the parties intend their relationship to be governed by Section 8(f), rather than Section 9(a), and imposes the burden of proving the existence of a 9(a) relationship on the party asserting that such a relationship exists. *H.Y. Floors & Gameline Painting*, 331 NLRB No. 44 (2000); *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d. 770 (3d. Cir. 1988), cert. denied 488 U.S. 889 (1988). To establish voluntary recognition in the construction industry pursuant to Section 9(a), the Board requires evidence that the union (1) unequivocally demanded recognition as the employees' 9(a) representative, and (2) that the employer unequivocally accepted it as such. *H.Y. Floors & Gameline Painting*, 331 NLRB, slip op. at 1. The Board also requires a contemporaneous showing of majority support by the union at the time 9(a) recognition is granted. *Golden West Electric*, 307 NLRB 1494, 1495 (1992). However, as to this contemporaneous showing, the Board has held that an employer's acknowledgement of such support is sufficient to preclude a challenge to majority status. *H.Y. Floors & Gameline Painting*, supra; *Oklahoma Installation Co.*, 325 NLRB 741 (1998).

In the instant matter, I find the parties reached agreement for a new contract by May 29, 2000, prior to expiration of the preceding contract. During the negotiations, the Intervenor unequivocally demanded 9(a) recognition from ACT, and represented that it possessed a majority of authorization cards from ACT plasterers. ACT unequivocally accepted the Intervenor's demand of 9(a) recognition based on its good-faith belief that the Intervenor represented a majority of its employer-member employees. ACT did not consider it necessary to review the cards provided by the Intervenor since the contractual language clearly contemplated the establishment of a 9(a) bargaining relationship and ACT thereby acknowledged the Intervenor's majority status. Thus, as of May 29, 2000, the Intervenor was the Section 9(a) representative of ACT plasterers, including employees of PCPC and W&G.

Assuming, arguendo, that the Intervenor had not sufficiently demonstrated its majority status by May 29, 2000, a valid 9(a) relationship had been established by at least late June 2000, when the Intervenor again provided the Employer with authorization cards from ostensibly a majority of the plasterers. The Employer's failure to review the cards or question the Intervenor's assertion of majority status does not defeat the Intervenor's effort to demonstrate its majority status, especially under circumstances where the Employer otherwise acknowledged the Intervenor's majority status.[6] Petitioner contends that pursuant to *Casale Industries*, 311 NLRB 951 (1993), it has, by the filing of the instant petition, raised a timely challenge to the validity of the 9(a) recognition of the Intervenor. In *Casale* the Board held that a challenge to majority status must be made within a 6-month period after the grant of a 9(a) recognition. As found above, the Intervenor and Employer had established a valid 9(a) bargaining relationship by May 29, 2000, which would make any present challenge by the Petitioner, or by the filing of its petition on December 19, untimely. However, even if the Intervenor had not demonstrated its majority status until late June, as discussed above, thereby making the Petitioner's challenge timely, the Petitioner has failed to show that the Intervenor did not indeed represent a majority of the Employer's plasterers at the time of recognition. The petition in and of itself does not cast a doubt on the Intervenor's majority status as achieved in June 2000. The Petitioner submitted no evidence at the hearing challenging the Intervenor's June 2000 majority status, or at any other date for that matter.

Even assuming the existence of a 9(a) relationship, the Petitioner contends that no contract bar can be interposed because no contract was ever executed by the parties asserting the bar. However, for contract bar purposes there is no requirement that the parties execute a printed, final, contract. Instead, the common thread running through the Board's contract bar decisions is that "the documents relied on as manifesting the parties' agreement must clearly set out or refer to the terms of the agreement and must leave no doubt that they amount to an offer and an acceptance of those terms through the parties' affixing of their signatures." *Seton Medical Center*, 317 NLRB 87 (1995). This does not mean that contracts must be formal documents or that they cannot consist of an exchange of a written proposal and a written acceptance. *Georgia Purchasing*, 230 NLRB 1174 (1977). It does mean that in such instances the informal documents that are exchanged must be signed by all of the parties in order to serve as a bar to an election. *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958); *Yellow Cab*, 131 NLRB 239 (1961); and *United Telephone Co. of Ohio*, 179 NLRB 732 (1969). Similarly, the documents must establish the identity and the terms of the agreement. See *Branch Cheese*, 307 NLRB 239 (1992). However, the absence of an execution date contained in the documents does not disqualify the contract as a bar if the date of execution precedes the filing of a challenging petition and that date can be established. *Cooper Tavles & Welding Corp.*, 328 NLRB 759 (1999).

By as early as June 1, 2000, and by no later than June 7, 2000, when ACT and the Intervenor signed the contract changes to the 2000–2003 contract, an executed contract existed sufficient for contract bar purposes. Although this document was undated, the record clearly establishes that it was signed at separate times by the Intervenor and Employer in late May or early June 2000, well before the filing of the petition, and that the document reflects the complete agreement of the parties. Accordingly, this document serves as a contract bar to an election.

Moreover, in November 2000, before the petition was filed, ACT and the Intervenor executed an amendment to the contract, which not only extended the geographic scope of the contract, but also reaffirmed the collective-bargaining agreement that they had reached in May 2000. Therefore, I find further basis for concluding that a full and complete contract was properly executed by the parties to serve as a bar to the instant petition.

Petitioner contends that the November 2000 amendment to the collective-bargaining agreement, which geographically expanded the scope of the bargaining unit, was designed to deny employees of the right to be represented by Petitioner, and that even if it is found that a contract bar exists, an election should be ordered in a separate unit of employees employed in those geographic areas traditionally within the Petitioner's jurisdiction.

[6] The "recognition agreement" that was signed by the Intervenor and Employer in February 2001 came after the filing of the petition in the instant matter and therefore is not determinative as to creation of a 9(a) relationship, although it is consistent with the parties' previous efforts to establish such a relationship.

However, to reach this result, the Petitioner initially must establish that the parties' agreement to extend the territorial definition of the bargaining unit is invalid. I find no basis to do so. The parties to a collective-bargaining relationship are normally free to modify the parameters of a bargaining unit at any time where to do so does not undermine the union's majority status or infringe upon the 9(a) status of another labor organization. If the unit, as modified, is otherwise an appropriate unit, and does not offend the Act, a contract covering that unit will act as a bar. In the instant matter, the parties have already stipulated that a statewide unit of plasterers employed by the Employer is appropriate.

Although this expanded unit is larger than had historically been the case under prior contracts with the Intervenor, there is no collective-bargaining history of negotiating with the Petitioner in those geographic areas now covered by the amendment to the contract. Consequently, I see no basis for perpetuating a geographic division of plasterers into separate units, as requested by the Petitioner, by ordering an election in only those counties which were not covered by the contract prior to the amendment of the unit. See *Dundee's Seafood, Inc.,* 221 NLRB 1183 (1976); *Groendyke Transport,* 171 NLRB 997, 998 (1968); and *John Sunduall & Co.*, 149 NLRB 1022 (1964).

Based on the above and the entire record in this matter.

IT IS HEREBY ORDERED, that the petition is dismissed. [7]

Dated at Detroit, Michigan, March 23, 2001.

[7] Under the provisions of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by April 6, 2001.